Supreme Court, U.S.
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No. 99-1203

IN THE

Supreme Court of the United States

DENNIS THERIOT, *et al.*,

Petitioners,

v.

PARISH OF JEFFERSON, STATE OF LOUISIANA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF THE PARISH OF JEFFERSON, STATE OF LOUISIANA, RESPONDENTS

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit clearly erred in affirming the district court's factual findings that the Jefferson Parish Council's creation of one council district with a black voting age population majority of 57.40%, done in compliance with the Fifth Circuit Order that it create a black voting age population majority district to remedy a violation under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, an order that is not challenged by Petitioners, was not predominantly motivated by race.

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The Parish of Jefferson[1] respectfully represents:

STATEMENT OF THE CASE

A. Statement Of Facts

Petitioners seek review by this Court of a decision by the United States Court of Appeals for the Fifth Circuit, which rejected Petitioners' constitutional challenge under the Fourteenth Amendment of the United States Constitution to the councilmanic districts in Jefferson Parish. Petitioners alleged that race predominated in the drawing of the districts, even though the Parish had acted to comply with a Fifth Circuit order requiring a black voting age majority district, and even though its plan had been approved by the district court. In its Order and Reasons in this case, the district court concluded that "while [race] was a factor, it is clear that political incumbency drove the pencil in designing these districts." The district court further noted that "[o]ther factors . . . at work [in the redistricting process] were (1) the need to maintain a one person/one vote ratio in the overall makeup of these districts, (2) the geographic realities of this [P]arish, including considerations with respect to contiguity and compactness, and (3) other traditional districting principles." App. at A-36. On appeal, the Fifth Circuit noted the district court had determined that past redistricting traditions in

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1. The other Respondents represented by undersigned counsel are: Timothy Coulon, in his official capacity as President of Jefferson Parish; Aaron Broussard, in his official capacity as Chairman of the Jefferson Parish Council; and T.J. "Butch" Ward, Lloyd F. Giardina, Donald Jones, Edmond Muniz, John Lavarine and Nick Giambelluca, all in their official capacities as members of the Jefferson Parish Council (hereinafter collectively referred to as the "Parish of Jefferson").

Jefferson Parish had not strictly adhered to geometric standards of compactness. App. at A-20. The appeals court also noted that the district court had determined that the "very irregular" geography and topography of the Parish (including the fact that it is fifty percent water) substantially limits the ability of the Parish to adhere to such standards. Like the district court, the appeals court affirmed the lower court's determination that any irregularity associated with the shape of District 3 was not driven predominantly by race, but rather was derivative of politics, adjoining communities of interest, one person/one vote concerns, and the geography and population distribution in the Parish. App. at A-20 – A-21.

As detailed below, there is no reason for this Court's review of the Petitioners' fact-bound contentions which have been soundly rejected both by the district and appellate courts.

I. The Geography and Topography of Jefferson Parish.

In examining any redistricting scheme in the Parish of Jefferson, it its important to recognize the geography and topography of this unique area. David Creed, an expert demographer, who testified at trial in this proceeding, explained that Jefferson Parish is one of the most irregularly shaped parishes in the State of Louisiana, running in a north-south direction. The Parish is not rectangular; rather, it is elongated and twisted toward the bottom. Moreover, a large portion of Jefferson Parish is comprised of marsh land, canals, and waterways. The Parish of Jefferson's unique shape is influenced by the fact that it is located on both sides of the winding Mississippi River, making it very difficult to draw smooth-looking rectangular boundaries. The Parish

runs from Lake Pontchartrain on the north all the way down to Grand Isle in the Gulf of Mexico and includes a number of cities. In many cases, the areas between these cities are nothing but moist and open land. Quite often it is necessary to create elongated districts to connect these cities in order to satisfy the constitutional mandate of one person/one vote. The Mississippi River, running from west to east, divides the Parish in two. The northern portion, because of its connection to the eastern half of the continent, is called the East Bank; the southern portion is the West Bank. In the past, the division between the East Bank and the West Bank shaped redistricting schemes which were, of course, impacted by the unique geography and topography of the Parish.

II. The *EJC* Litigation.

The Parish of Jefferson is a political subdivision of the State of Louisiana. The Jefferson Parish Home Rule Charter provides that the seven-member Council is the legislative and policy-making body of the Parish, with the Parish President acting as the chief administrative officer. Pursuant to the previous Jefferson Parish Home Rule Charter in effect in 1986 when the lawsuit entitled *East Jefferson Coalition for Leadership and Development v. The Parish of Jefferson*, C.A. No. 86-3668 (the "*EJC* litigation"), was filed, the seven members of the Council were elected as follows: one councilmember was elected at-large (the Council Chairman); two councilmembers were elected quasi-at-large, that is, one was elected from Districts 1 and 2 combined (the West Bank); and another was elected from Districts 3 and 4 combined (the East Bank); the remaining four councilmembers were elected from each of the four separate councilmanic Districts, 1, 2, 3 and 4. This plan was often referred to as the 4-2-1

plan.[2] In 1986, private plaintiffs brought a challenge under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 ("Section 2"), and the United States Constitution, challenging the "4-2-1" method of electing the Jefferson Parish Council. The *EJC* plaintiffs alleged that the councilmanic configuration that existed in 1986 diluted their voting strength and had the effect of negating their vote in councilmanic elections.[3]

After two years of protracted litigation, the district court in *EJC* ruled that the Parish's councilmanic electoral scheme violated Section 2 of the Voting Rights Act. The *EJC* court's factual findings and conclusions of law are reported at 691

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2. In 1971, a district court found that the districting plan for the Parish Council was malapportioned and replaced it with a plan that satisfied the constitutional one person/one vote standard. *Grisbaum v. McKeithen*, 336 F. Supp. 267 (E.D. La. 1971). In the court-ordered plan, two of the four single-member districts crossed the Mississippi River in order to remedy the malapportionment of the existing districts. In January of 1986, another reapportionment suit was filed, *Cedric Floyd v. Parish of Jefferson*, C.A. 86-0265 (E.D. La.). In 1987, as a result of that suit, the Parish reapportioned its districts once again.

3. Under the 1980 United States Census, which applied at the time the *EJC* lawsuit was filed, African-Americans in Jefferson Parish comprised 13.86% of the total population, and 11.78% of the voting age population. Jefferson Parish then had a total population of 454,592 persons and an African-American population of 63,001. According to the 1980 census, the voting age population at that time was 314,323 persons, of whom 268,878 were white and 37,039 were African-American. In the four elections held prior to the 1991 Jefferson Parish councilmanic race, four African-American candidates sought seats on the Parish Council, and no African-American candidate had been elected in any of these races.

F. Supp. 991 (E.D. La. 1988). The district court in this case took judicial notice of the facts in the *EJC* action. After the *EJC* court's initial liability finding, the Parish proposed a "6-2-1" plan, which would have increased the size of the Council from seven to nine members and provided for the election of six members from single-member districts, two members from single-member "superdistricts," and one member at large. This plan created no black majority districts; District 3, under the Parish's proposed plan, had a 45.9% black population. *East Jefferson Coalition v. Parish of Jefferson*, 706 F. Supp. 470, 472 (E.D. La. 1989).

The *EJC* court tentatively approved the Parish plan with one modification: the elimination of the two superdistricts. After the Department of Justice ("DOJ") interposed an objection to the districting plan pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c; both parties to the *EJC* case later agreed upon a revised "6-1" districting plan that created one black-majority district (District 3) with a total black population of 51.7%, according to the 1980 Census. The DOJ precleared this plan and the district court entered an order accepting the precleared plan as the proper remedy to the violations of § 2 of the Voting Rights Act. On March 21, 1991, the Fifth Circuit affirmed the district court's finding in the *EJC* litigation that the then-existing councilmanic structure violated Section 2 of the Voting Rights Act of 1965. *See East Jefferson Coalition v. Parish of Jefferson*, 926 F.2d 487 (5th Cir. 1991). The Fifth Circuit also remanded the case to the district court to "permit the district court to supervise prompt implementation of the redistricting plan."

III. Developments Post-1990 Census.

After remand from the Fifth Circuit's March 21, 1991 ruling, the district court in the *EJC* litigation held a status conference stating that the plan had to be modified to be in accord with the population variances triggered by the 1990 Census.[4] In early 1991, the 1990 Census data for Jefferson Parish was released and revealed that there were substantial population shifts among the districts in the newly created districting plan in terms of total population. In addition, the 1990 Census data showed that District 3 in the precleared plan had a black voting age population ("BVAP") of 52.3%.[5] Pursuant to the district court's directives, the Jefferson Parish Council modified the redistricting plan to take into account various population changes necessitated by the 1990 Census. Several redistricting plans were considered by the Jefferson Parish Council prior to the adoption of the final plan. Jefferson Parish's interest in avoiding contests between incumbent councilmembers primarily influenced the design of the challenged districting plan. As the district court cogently observed in this case, while "Plaintiffs contend that race was predominant . . . it is clear that political incumbency

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4. The district court also encouraged the parties to work together to formulate the necessary modifications in an expedited fashion and to adhere to a May 15, 1991 deadline for submission of a modified redistricting plan.

5. Under the 1990 Census, Jefferson Parish had a total population of 448,306 persons, of whom 331,894 (74.0%) were white and 78,263 (17.5%) were African-American. The voting age population at that time was 315,765 persons, of whom 266,962 were white and 48,803 were African-Americans. African-Americans in Jefferson Parish then comprised approximately 15% of the voting age population.

drove the pencil in designing these districts." App. at A-48.[6] Stated another way, political preservation was paramount.

The focus of most of the discussions among the Parish Council during the 1991 redistricting negotiations with the *EJC* plaintiffs was West Bank political concerns. In particular, Councilmembers James Lawson and Lloyd Giardina knew that they were likely to run against each other in District 2. The resulting (and presently challenged plan) was dubbed the "Lawson Plan" primarily because many of the modifications to the *EJC* plaintiffs' proposed District 3 were made at the behest of District 2 incumbent, James Lawson.[7] During trial, both Lawson and Giardina testified that the configuration of Districts 2 and 3 (which aided Lawson) was the deciding factor in Lawson's victory.[8] The district court also received substantial trial evidence that

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6. The *EJC* plaintiffs proposed an alternative plan that the Parish councilmembers chose not to adopt and that contained one black-majority district (District 3) in which black voting age persons represented approximately 55% of the population. The Parish Council did not accept the Petitioners' plan because "it totally eschewed all principles of incumbency and traditional geographic districts in Jefferson Parish . . ." App. at A-52.

7. Lawson and Giardina both vied for the District 2 seat in 1991. In an extremely close and acrimonious election contest, Lawson was elected.

8. Councilmember Giardina opposed Lawson's plan because Giardina's residence was placed in District 1, which was a political disadvantage to a District 2 candidate. Giardina testified that Lawson exploited this residency issue during the campaign and it contributed to Giardina's loss in 1991. The district court recognized these facts as contributing to the political scheme behind the councilmanic configuration.

Giardina, the losing candidate, lost because of the configuration of the councilmanic districts that favored the victor, Lawson. Lawson and Giardina agreed that the districts had been designed to get Lawson elected. App. at A-15 – A-16.

District 3 in the alternative redistricting plan created and advocated by Councilmember Giardina was smaller than the challenged District 3 and did not include Grand Isle, in the Gulf of Mexico, and portions of Lafitte, halfway between the Gulf and the River. The redistricting plan proposed by Councilmember Giardina also did not split the large subdivision of Woodmere, which he wanted to keep wholly in District 2 to his political advantage. This configuration, as the district court concluded after hearing the overwhelming testimony on political motivation, would have politically assisted Giardina.[9]

By Resolution No. 69122, passed on May 8, 1991, the Jefferson Parish Council adopted a modified redistricting plan, by a vote of 6-1.[10] Giardina was the only member of

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9. The trial evidence disclosed that residents of Woodmere had strongly supported Giardina's candidacies in the past. Lawson wanted at least part of Woodmere excluded from any proposed District 2 because he wanted to improve his own re-election prospects at the expense of Giardina's. Lawson and his former aide, Kenneth Hughes, testified that a portion of the Woodmere residents were angry with Lawson concerning drainage problems; these Woodmere residents were removed from District 2 under Lawson's politically-infused plan, as the detailed factual findings issued by the district court corroborate.

10. After the publication of the Lawson Plan in the local newspaper, which included, at that time, Maplewood in District 3, (Cont'd)

the Council to vote against this plan. The modified redistricting plan retained the six-and-one councilmanic scheme, with six single-member councilmanic districts and one at-large seat. The plan also included a black majority councilmanic district, District 3, with a BVAP of 57.40%; those councilmanic lines politically favored Lawson.[11]

The district court rejected the modified redistricting plan, admonished the parties for letting "politics" enter the districting process, and appointed a special master to draw up a redistricting proposal for the Court. The special master submitted a "6-1" redistricting plan to the district court containing a black councilmanic district with a 49% BVAP. Subsequently, the Fifth Circuit approved the modified redistricting plan submitted by the Jefferson Parish Council to remedy the Section 2 violation, reversed the district court's judgment implementing the special master's plan, and remanded the case to the lower court. In its August 8, 1991

(Cont'd)

a portion of Maplewood was later moved from District 3 into District 1 in the final plan; the trial evidence was unrebutted that this change was an accommodation to Ida Saik, a political activist who complained loudly and publicly to Councilmembers Ward and Lawson about her exclusion from District 1. As the result of Saik's protestations, her home was placed in District 1 as a "last minute" adjustment to eliminate her broadcasted complaints and placate one of Councilmember Ward's constituents.

11. During the negotiation process in 1991, there were communications with the DOJ concerning how retrogression was analyzed in the context of Section 5. It was explained that retrogression was measured using the most current census data and the most recent precleared plan. Using that measurement, the DOJ suggested that the nonretrogression benchmark for the BVAP in District 3 in the new plan would be 52.3%.

ruling, the Fifth Circuit also stated that the special master's plan "must fall for failure to include the one district with a majority black voting age population."[12]

After the Fifth Circuit's mandate and the district court's ruling of August 13, 1991, the Jefferson Parish Council submitted a plan to the DOJ which reflects the following: a seven-member Council to be comprised of six single-member districts and one at-large district. The black majority councilmanic district included a BVAP of 57.40% under the 1990 Decennial Census. The DOJ precleared the plan. It is this redistricting plan, previously approved by the DOJ and ordered to be implemented by the *EJC* Court and the Fifth Circuit to address § 2 violations, that has been challenged by the Petitioners nearly a decade later.[13]

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12. The circuit court expressly ruled that "the district court should promptly adopt and implement a plan that, while applying 1990 census data, otherwise remains as faithful as practicable to 'the' Plan, including a black voting age majority population in District No. 3."

13. In the 1991 first primary for Parish Council in the newly created District 3, Donald Jones, an African-American, received the most votes from African-American voters and Charles F. Lightfoot, a white person, received the most votes from non-African-American voters. Donald Jones was elected to the Jefferson Parish Council for District 3 in 1991. Jones' election as the Council representative for District 3 marked the first time in the twentieth century that an African-American was elected to the Jefferson Parish Council.

B. Course Of Proceedings And Disposition In Courts Below

The catalyst for this lawsuit arose on July 28, 1995, when a few residents of councilmanic District 3 in Jefferson Parish and the Maplewood Civic Association sought declaratory and injunctive relief against the Parish of Jefferson, *et al.*, that the current Jefferson Parish Council districting plan is an unconstitutional racial classification in violation of the Fourteenth Amendment to the United States Constitution. In this action, Petitioners attack the councilmanic districts authorized by the district court and the Fifth Circuit in the prior *EJC* litigation. A number of the Petitioners were dismissed due to lack of standing or because they did not want to pursue their allegations.

Trial in this action began on March 10, 1997. The parties presented nearly a week of testimony. On April 24, 1997, the district court rendered its Order and Reasons, entering judgment in favor of defendants, dismissing Petitioners' constitutional challenge as a matter of law. In its Order and Reasons, the district court found that "while [race] was a factor, it is clear that political incumbency drove the pencil in designing these districts." App. at A-48. On August 17, 1999, the Fifth Circuit entered judgment, affirming the lower court's opinion. The Fifth Circuit stated that "[l]ike the district court before us, we cannot find that race predominated. While relevant, issues pertaining to race were subordinated to concerns for political incumbency, joining communities of interest, satisfying one-person, one-vote requirements, and geographical realities." App. at A-29. On November 15, 1999, Petitioners filed their petition for writ of certiorari with this Court. On January 17, 2000, Petitioners refiled a completely redrafted petition for writ of certiorari with substantive changes.[14]

14. Petitioners received a letter dated November 17th from the Clerk of the United States Supreme Court in accordance with Supreme Court Rule 14.5 returning all copies of the petition for writ of certiorari for noncompliance of the Supreme Court rules. Petitioners were directed to file "corrected" briefs within 60 days.

SUMMARY OF ARGUMENTS FOR DENYING WRIT

On August 8, 1991, the United States Court of Appeals for the Fifth Circuit ordered, as a remedy for a previously adjudicated violation of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, the imposition of a redistricting plan for the Jefferson Parish Council, the governing body of Jefferson Parish, Louisiana, which would include one district having a BVAP majority. Four years later, Petitioners filed this separate action against the Council, arguing that the plan adopted in response to the Fifth Circuit's Order violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Although Petitioners do not claim that the underlying Order by the Fifth Circuit was unconstitutional, they do contend that the Council's decision to comply with that Order by creating District 3 with a BVAP of 57.40% was predominantly motivated by race. The district court found, to the contrary, that the Council's selection of this particular District 3, rather than some other BVAP majority district, was "driven primarily by politics," not race, App. at A-63, and the Fifth Circuit affirmed, finding no clear error. App. at A-21.

The only question properly before this Court is whether the Fifth Circuit erred in affirming the district court's factual findings in this constitutional case. As will be demonstrated hereafter, the first question purportedly presented by the Petition, concerning the proper application of § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, was not resolved by the district court or the Fifth Circuit and is not properly before this Court. The DOJ advised the Council that it would use the 1990 BVAP of 52.3% in the prior version of District 3 as a benchmark against which to measure retrogression under

§ 5. Contrary to Petitioners' arguments, Petn. 6-7, the courts below did not hold that the Council was required to recognize this benchmark, but only that it was "justified" in so doing, App. at A-24, A-58, so that the use of that benchmark did not suffice to prove discriminatory intent. The third issue purportedly raised by the petition, whether the boundaries of the new District 3 are supported by a compelling state interest, was not reached by the Fifth Circuit. App. at A-22, A-23. In fact, the Fifth Circuit declined to address the issue, since Petitioners had failed to demonstrate that race predominated, a prerequisite for strict scrutiny analysis. App. at A-23. In the unlikely event that this Court should reverse the factual finding of the courts below that the Parish Council was not predominantly motivated by race in drawing District 3, this Court's customary course of action would be to remand to the Fifth Circuit for application of strict scrutiny in the first instance. *California Dental Ass'n v. F.T.C.*, 526 U.S. 756, 119 S. Ct. 1604, 1618 (1999); *United States v. O'Hagan*, 521 U.S. 642, 678, 117 S. Ct. 2199, 2220 (1997).

The inescapable and uncontroverted factual foundation of this case is the Fifth Circuit's Order in the *EJC* litigation to create a district with a BVAP majority to remedy a Section 2 violation. While the Fifth Circuit correctly noted in this case that "much of [petitioners'] argument appears designed collaterally to attack the lower court's previous findings of a Section 2 violation," App. at A-22 n.23, Petitioners never deigned to ask the district court or the Fifth Circuit to invalidate that order, and they do not challenge it in their petition to this Court. Having accepted, then, that the Council was obliged to create a BVAP majority district to remedy a Section 2 violation, Petitioners faced a steep challenge in proving that the boundaries of the District 3 as actually created, using a BVAP of 57.40%, were determined

predominantly by race, rather than by more traditional political considerations. Applying settled law to the evidence, both courts below appropriately determined that Petitioners had failed to carry their burden and the lower courts likewise rejected Petitioners' perception of the witnesses' testimony. Contrary to Petitioners' representations, the lower courts established no new principles of law which require this Court's attention. The courts below fully considered and correctly decided this constitutional case and this Court certainly need not review the evidence, including the trial testimony, a third time.

The decision below turns on its unique facts. This Court's resources are best devoted to cases which present compelling reasons for review; the instant matter is not such a case.

ARGUMENT

A. Petitioners' Complaint Is Simply That The Lower Courts Did Not Believe Their Proffered Evidence. There Is No New Substantive Holding As A Result Of The Decision Below, Nor Is There A Conflict Among The Circuits That Warrants Review By This Court.

This case was and remains a constitutional challenge brought by Petitioners under the Fourteenth Amendment. The evidentiary linchpin in such cases is whether there has been intentional racial discrimination. In this case, the decisions below turn upon their own unique facts. Both the trial court and the appeals court appropriately determined that the Parish of Jefferson was not predominantly motivated by race in

drawing District 3. To the extent that District 3 embodies irregular features, politics and other nonracial factors were the driving force.

In *Miller v. Johnson*, 515 U.S. 900, 915, 115 S. Ct. 2475, 2488 (1995), this Court observed that a district court's review of a challenge to a state's redistricting plan should begin with the presumption that the state has acted in good faith compliance with constitutional standards. In *Bush v. Vera*, 517 U.S. 952, 955, 116 S. Ct. 1941, 1950 (1996) (plurality opinion), this Court stated that it is not enough for a claimant to show that race was one of several factors animating the drawing of a district's boundaries to overcome the presumption of good faith and to trigger strict scrutiny; rather, for strict scrutiny to apply, a claimant must prove that race was the predominant factor motivating the state's redistricting decision. *Miller*, 515 U.S. at 915, 115 S. Ct. at 2488. In order to meet that burden, a person making a constitutional challenge of the state's plan must prove that the state "subordinated traditional districting principles to race." *Miller*, 515 U.S. at 919, 115 S. Ct. at 2490.

Applying those well-settled principles, the district court in this case found that Petitioners failed to show that race predominated in the configuration of District 3. That factual finding is entitled to deference on appeal and may be reversed only if it is clearly erroneous. *Miller*, 515 U.S. at 915, 115 S. Ct. at 2488. The clear error standard of review has been applied by this Court in other constitutional voting rights cases as well. *See Rogers v. Lodge*, 458 U.S. 613, 622-627, 102 S. Ct. 3272, 3278-3281 (1982). Moreover, this Court has emphasized the special familiarity of district courts with the community where the district courts are situated, including traditional districting principles used in the

jurisdiction and the intrinsically local geographic factors. *White v. Regester*, 412 U.S. 755, 769-770, 93 S. Ct. 2332, 2341 (1973). In seeking to overturn the district court's factual findings that they have failed to prove race predominated in the drawing of District 3, Petitioners in essence are asking this Court to make its own independent assessment of the evidence with respect to compactness, shape, contiguity, relationship to political subdivisions and communities of interest, and to reach different conclusions from those reached by the district court and the appeals court. Equally as significant, Petitioners' application rests upon their desire for this Court to reject the chronicled credibility choices of the district court and for this Court to make contrary credibility choices. Revealing the precariousness of their position, Petitioners ask this Court to accept their factual views and substitute these views for the lower courts' assessment of credibility based upon Petitioners' cross-examination of several witnesses during trial; however, the relevant inquiry is whether the district court's factual findings (including credibility choices and recognition of bias), affirmed by the appeals court, are clearly erroneous. They are not.

In seeking to reverse the lower courts' findings that District 3 is constitutionally sound, Petitioners rely on this Court's decisions in *Miller, Vera* and *Shaw v. Hunt*, 517 U.S. 899, 116 S. Ct. 1894 (1996); however, Petitioners' reliance on these cases is misplaced. In *Miller, Shaw*, and *Vera*, the district courts had determined that race had in fact played a sufficient role in the design of the districts to warrant strict scrutiny analysis. *Miller*, 515 U.S. at 907, 115 S. Ct. at 2484; *Shaw*, 517 U.S. at 904, 116 S. Ct. at 1900; *Vera*, 517 U.S. at 957, 116 S. Ct. at 1951. In contrast, in this case, both the district court and the appeals court found that race was not

the predominant motive in the district's design. Since the district court's factual findings on the issue of predominant motive are reviewed under the clearly erroneous standard, this critical distinction is significant both legally and factually.

After three long days of trial in this proceeding at which time 22 witnesses testified and 55 exhibits were introduced, Petitioners failed to prove that any circumstances had changed in Jefferson Parish through March of 1997, regarding the prior factual findings in the *EJC* litigation of racially polarized voting;[15] the geographic compactness and political cohesion of African-Americans; the existence of vestiges of discrimination in the Parish of Jefferson;[16] and the communities of interest among African-Americans within District 3.[17]

The testimonial evidence at trial proved that the redistricting process was first and foremost predominantly political and driven by incumbency concerns, such as

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15. Dr. Richard Engstrom testified as an expert witness on voter analyses. His testimony, which was uncontroverted by Petitioners, confirmed that there remains a pattern of racially polarized voting in Jefferson Parish, since the conclusion of the *EJC* litigation.

16. Dr. Raphael Cassimere, Jr. testified as an expert historian. His testimony, which was uncontroverted by Petitioners, indicated that vestiges of racial discrimination in the Parish of Jefferson persist today.

17. Dr. Lawrence Powell testified as an expert historian. His testimony, which was uncontroverted by Petitioners, explained the political cohesion and the communities of interest among African-Americans in District 3.

District 3's "V-shape."[18] The current District 3's departure from the shape of District 3 in the East Jefferson Coalition's alternative plan was the result of non-racial redistricting criteria, mainly, incumbency protection and the need for contiguity, as well as an even distribution of the population.[19] As the Fifth Circuit correctly observed, "[t]he record reveals no clear error inasmuch as incumbency protection, maintaining community of interest, addressing one person, one vote concerns and natural geographic conditions predominated in drawing District 3." App. at A-12.

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18. As detailed earlier, the appeals court observed that the district court had determined that past redistricting tradition in Jefferson Parish had not strictly adhered to geometric standards of compactness. App. at A-20. The appeals court also noted that the lower court had determined that the "very irregular" geography and topography of the Parish (including the fact that it is 50% water) substantially limits the ability of the Parish to adhere to such standards. In light of these findings, the district court rejected Petitioners' assertion that the district was bizarre on its face and the appeals court agreed. App. at A-20 – A-21.

19. Grand Isle and lower Lafitte had been in District 2. Lawson considered these areas to be pro-Giardina, so he admitted he moved these areas into District 3. This area was in the southern portion of the Parish and is divided from the unincorporated municipality of Jean Lafitte by canals and the Intracoastal Waterway. Thus, Lawson carved a "V" into that area, preserving as much of the Lafitte area as possible in District 2. He jettisoned the rest into District 3; hence, Grand Isle and Barataria became part of District 3. Lawson, a Democrat, and Giardina, a Republican, two political rivals, both testified that these districts were created to help Lawson get re-elected. App. at A-15 – A-16. Lawson was re-elected in an acrimonious contest against Giardina.

The evidence supports the lower courts' factual findings that race did not predominate in the drawing of District 3 and these factual findings cannot be undercut by Petitioners' attempt to demand race-neutral explanations for each boundary of District 3. Under Petitioners' approach, strict scrutiny would be mandated for any consideration of race. The Fifth Circuit astutely made this observation in the course of its own opinion when it noted that Petitioners "implicitly argue that *any* consideration of race, even where such consideration is de minimus, mandates a finding that race predominates. This implication or argument has been squarely rejected by *Miller, Vera, Abrams* and the *EJC* litigation; therefore, we cannot agree." App. at A-22. In rejecting Petitioners' challenge, both the district court and the appeals court accurately concluded that, while issues of race were certainly relevant inasmuch as the Parish Council was directed to remedy a Section 2 violation, race did not predominate. App. at A-22. Respondents submit that the lower courts were correct in concluding that the evidence shows that the Parish was pursuing a mix of wholly legitimate interests without race predominating in drawing District 3. While Petitioners seek to have this Court make its own independent assessment of the evidence and witnesses' demeanor, the relevant inquiry was and remains whether the lower courts' findings are clearly erroneous and Respondents submit that they are not.

Both the district court and the Fifth Circuit applied well-established Fourteenth Amendment decisional law to the peculiar facts of this case. The courts below fully considered and correctly decided the issues. Contrary to Petitioners' representations, the findings of the lower courts are not clearly erroneous, and, in light of the facts peculiar to this case, this decision in no way establishes any new principles of law that will have any application in any other case.

B. Petitioners Have Sought Review On The Issue Of Whether The Boundaries Of The New District 3 Were Supported By A Compelling State Interest. That Issue Was Not Reached By The Fifth Circuit.

One of the issues argued by Petitioners is whether the boundaries of the new District 3 were supported by a compelling state interest. *See* App. at A-22, A-23. The Fifth Circuit properly declined to address this issue.

Under this Court's precedents, it is well-settled that there is no equal protection violation and, indeed, no strict scrutiny analysis merely because race is a factor in the shaping of an electoral district. *See Bush v. Vera*, 517 U.S. at 958, 116 S. Ct. at 1951 ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race.") Moreover, strict scrutiny does not, as Petitioners suggest, apply to every instance involving the intentional creation of majority-minority districts. *See DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994) (strict scrutiny did not apply to an intentionally created compact majority-minority district), *summarily aff'd*, 115 S. Ct. 2637 (1995). To trigger strict scrutiny it was incumbent upon Petitioners to demonstrate under *Miller* and *Vera*, that race played a predominant role, subordinating all other neutral redistricting principles in the design of the challenged districts.

In this constitutional challenge, the Fifth Circuit concluded that the resolution of this case turned on the discrete issue of whether race predominated in the redistricting plan. *See* App. at A-29. After a thorough analysis, the Fifth Circuit decided, as had the lower court, that Petitioners had failed to prove that race predominated — a prerequisite for strict scrutiny analysis. App. at A-23.

In its opinion, the Fifth Circuit further observed that while the lower court had addressed strict scrutiny in an abundance of caution, it declined to do so. App. at A-23.

If this Court decides to disturb factual findings of the courts below that the Parish Council was not predominantly motivated by race in drawing District 3, this Court's customary course of action would be to remand to the Fifth Circuit for application of strict scrutiny in the first instance.[20] While Respondents maintain that the lower courts below fully considered and correctly decided the issue that strict scrutiny did not apply, if this Court decides to reverse those factual findings, Respondents submit that this Court should remand to the Fifth Circuit for application of strict scrutiny, which would lead to the same judgment of dismissal.

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20. In *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816 (1993), the district court dismissed as a matter of law a claim of racial gerrymandering in the formation of a majority-black legislative district. Though this Court reversed, it remanded the case to the district court for application of the articulated standards. 509 U.S. at 658, 113 S. Ct. at 2832. *See also Gilbert v. Homar*, 520 U.S. 924, 935-36, 117 S. Ct. 1807, 1814 (1997) ["Because neither the Court of Appeals nor the District Court addressed whether . . . petitioners violated due process . . . we will not consider this issue in the first instance, but remand for consideration by the Court of Appeals."]

C. Petitioners Have Sought To Refashion The Issues They Presented To The Lower Courts And Which Were Adjudicated By The Lower Courts By Contending That The Issue Of Retrogression Was A Linchpin In This Case; It Was Not. The Lower Courts Did Not Hold That The Parish Of Jefferson Was Required To Meet A Benchmark And It Is Inappropriate For Petitioners To Seek To Sidestep The Lower Courts' Factual Findings Through Certiorari Review.

Petitioners are seeking to have this Court review the proper application of § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Petitioners seek review of this issue notwithstanding the fact that this issue was neither resolved by the Fifth Circuit nor the district court and is, therefore, not properly before this Court.

Respondents acknowledge that Jefferson Parish is covered by § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Under § 5, the Parish, as a covered jurisdiction, may not "enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964" unless it secures preclearance. 42 U.S.C. § 1973c. Preclearance is achieved in one of two ways: filing a declaratory judgment action in the United States District Court for the District of Columbia or, submitting the change to the United States Attorney General. *See* App. at A-23. In *Beer v. United States*, 425 U.S. 130, 141, 96 S. Ct. 1357, 1364 (1976), this Court determined that a voting change may not be precleared if it "would lead to a retrogression in the position of racial minorities with respect to the effective exercise of the electoral franchise."

In *Beer*, this Court observed that "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." 425 U.S. at 141, 96 S. Ct. at 1363. *See also Reno v. Bossier Parish School Board*, 120 S. Ct. 866, 871-872 (2000). As a general rule, the determination of retrogression requires a comparison between the proposed voting change and the last legally enforceable practice or procedure used by the jurisdiction. *See* 28 C.F.R. § 51.54(b)(1) (1999); *Abrams v. Johnson*, 521 U.S. 74, 97-98, 117 S. Ct. 1925, 1939 (1997) (proper benchmarks are the plans that are in effect). The latter standard is usually referred to as a benchmark. App. at A-24.

In this constitutional challenge, the district court made detailed factual findings that Jefferson Parish was *justified* in using 52.3% BVAP as the appropriate benchmark for determining retrogression under § 5. App. at A-24. The Fifth Circuit observed on appeal that while the Lawson Plan slightly exceeded the benchmark, the Fifth Circuit stated that it was political incumbency and other political concerns that were the driving forces. App. at A-26.

The DOJ advised the Council that it would use the 1990 BVAP of 52.3% in the prior version of District 3 as a benchmark against which to measure retrogression under § 5. Contrary to Petitioners' arguments, Petn. 6-7, the courts below did not opine that the Council was required to recognize this benchmark, but only that it was justified in doing so, App. at A-24, A-58; consequently, use of that benchmark did not suffice to prove discriminatory intent. Since this is a constitutional case, the decision by the Parish to meet that benchmark is certainly not probative of

intentional racial discrimination. Moreover, the lower courts did not opine whether the Parish violated § 5 and equally significant, the lower courts did not need to reach this issue in view of the factual recitations behind the political creation of the councilmanic districts. Indeed, a local court has no jurisdiction to determine whether a practice satisfies § 5; the "inquiry of a local district court in a § 5 action against a State or political subdivision is 'limited to the determination of whether "a [voting] requirement is covered by § 5. . . ." ' " *United States v. Board of Supervisors of Warren Co., Mississippi*, 429 U.S. 642, 645-46, 97 S. Ct. 833, 835 (1977) (citations omitted). Succinctly stated, the § 5 issue alternatively argued by Petitioners is nothing more than one facet of the controlling issue of whether there was discriminatory intent; it does not, as Petitioners assert, set a legal benchmark for the Fifth Circuit, nor any other circuit court. Concomitantly, the lower courts held that there was no discriminatory intent.

Regardless of how Petitioners try to frame their issues, this case is not a § 5 case; the issue adjudicated was whether race predominated in the drawing of District 3. It did not. Respondents submit that the lower courts properly determined that race *did not* predominate; hence, contrary to Petitioners' far-stretched argument, the issue of the proper benchmark for retrogression under § 5 is not central to the lower courts' opinions as those courts correctly recognized.

CONCLUSION

This is not a case worthy of the Court's limited judicial resources. The decisions below turn in large measure upon specific factual findings and credibility choices. The lower courts' decisions correctly analyzed and adjudicated the issues. Petitioners have not demonstrated any need for this Court to revisit their "sufficiency of the evidence" claims, regardless of the terms in which these arguments are now couched. For the factual and legal reasons set forth above, review by this Court is neither necessary nor appropriate and the Writ of Certiorari should not issue.

Respectfully submitted,

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